RECORD
AND
BRIEFS

No. 10-1491

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI. LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA,

Petitioners,

vs.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC, SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* SOUTH AFRICAN JURISTS ANTON KATZ, MAZ DU PLESSIS, AND CHRISTOPHER GEVERS, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae respectfully submit this supplemental brief pursuant to Supreme Court Rule 37 in support of Petitioners. *Amici* (listed in Appendix A) are experts on international law and the law and jurisprudence of South Africa. In response to this Court's request for supplemental briefing in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, *amici* respectfully urge this Court to affirm that the ATS permits causes of action for violations of the law of nations occurring within the territory of a sovereign other than the United States, since conduct covered by the ATS would be considered wrongful, and therefore actionable, as a delict under South African law.[1]

SUMMARY OF ARGUMENT

Under South African law, as under English law, the equivalent of the U.S. doctrine of transitory torts is embraced, as a matter of common law. South African courts can *as a matter of jurisdiction* consider torts—or delicts—committed outside the territorial jurisdiction of the Republic of

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[1] Counsel of record for all parties have consented to the filing of this *amicus curiae* brief and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

South Africa on the basis of the transitory tort doctrine.

Furthermore, as a matter of substantive law, the acts governed by the U.S. Alien Tort Statute, 28 U.S.C. § 1350 (ATS), would be actionable under the South African law of delict. The conduct covered by the ATS—violations of the law of nations—would be considered wrongful, and therefore actionable, as a delict under South African law: (i) through the *direct* application of the relevant customary international law in terms of the South African Constitution, and (ii) through the classification more generally of such criminal conduct as consequently wrongful under the South African law of delict.[2]

South African jurisprudence in these regards must be set against a broader trend towards extraterritorial jurisdiction in Africa, particularly

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[2] Under South African law, a tort is described as a delict. As A.B. Edwards notes, while the common law notion of *tort* and the civil law notion of *delict* are not synonymous:

> [R]eferents of the technical expressions "delict," "tort," "*onrechtmatige daad*," "*unerlaubte Handlung*," "*delit civil*" have sufficient in common to warrant their subsumption under that broad legal category which contemplates the award of compensation to a person suffering damage as a result of the unlawful act of another.

A.B. Edwards, *Choice of Law in Delict: Rules or Approach?*, 96 S. Afr. L.J. 48, 48–49 (1979).

in respect of crimes against humanity, war crimes, and genocide, and pursuant to African states' obligations under the Rome Statute of the International Criminal Court. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9.

ARGUMENT

I. EXTRATERRORITORIAL "TORTS" ARE JUDICIABLE UNDER SOUTH AFRICAN LAW.

Under South African law, as under English law, the equivalent of the U.S. doctrine of transitory torts is embraced, as a matter of common law. Jurisdiction in civil matters "means the power vested in a court to adjudicate upon, determine and dispose of a matter."[3] In this regard, section 19(1)(a) of the Supreme Court Act 59 of 1959 states:

> A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction

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[3] *Gallo Africa Ltd. and Others v. Sting Music (Pty) Ltd. and Others* 2010 (6) SA 329 (SCA), at 3 para. 6 (S. Afr.). Notably South African courts have not yet set out the different forms of jurisdiction (i.e. prescriptive, adjudicative, and enforcement) and elide them generally. By comparison, see the Canadian Supreme Court's decision in *R. v. Hape*, [2007] 2 S.C.R. 292 (Can.), para. 58. For the most part the discussion here focuses on *adjudicative* jurisdiction.

> *and all other matters of which it may according to law take cognizance . . . .*

Supreme Court Act 59 of 1959 § 19(1)(a) (emphasis added). However, as South Africa's Supreme Court of Appeal noted recently in *Gallo v. Sting*:

> Section 19(1)(a) of the Supreme Court Act . . . has a long history, which need not be related. However, our courts have for more than a century interpreted it to mean no more than that the jurisdiction of High Courts is to be found in the common law. For purposes of effectiveness the defendant must be or reside within the area of jurisdiction of the court (or else some form of arrest to found or confirm jurisdiction must take place). Although effectiveness "lies at the root of jurisdiction" and is the rationale for jurisdiction, "it is not necessarily the criterion for its existence." *What is further required is a* ratio jurisdictionis. *The ratio, in turn, may, for instance, be domicile, contract, delict and* . . . ratione rei sitae. *It depends on the nature of the right or claim whether the one ground or the other provides a ground for jurisdiction.* Domicile on its own, for instance, may not be enough. As Forsyth rightly said, "First there is

> the search for the appropriate *ratio jurisdictionis*; and then the court asks whether it can give an effective judgment . . . [and] neither of these is sufficient for jurisdiction, but both are necessary for jurisdiction."

Gallo v. Sting (6) SA para. 10 (quoting C.F. Forsyth, *Private International Law* 164 (4th ed. 2003)) (emphasis added).

While the basis for doing so is unclear (and the examples are limited), under the common law, South African courts can exercise jurisdiction over torts committed outside the territory of the Republic.[4] The first reported case of such extraterritorial jurisdiction is a decision of the Supreme Court of the Cape of Good Hope in which it heard delictual claims (for defamation and assault) arising from an altercation on a ship, *The Duke of Bedford*, whilst it was *en route* from India to England. *See Wallace v. Hill & Scheniman*, (1828) 1 Menz. 347; *Hill v. Wallace*, (1829) 1 Menz. 347. Both parties to the action were foreigners, and jurisdiction was secured by arrest (*judicio sisti et judicatum solvi*). Notably, the Court held that:

> No objection was made by the defendant, and consequently, no decision given, as to the validity of his

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[4] Insofar as jurisdiction is concerned, our common law is based on Roman-Dutch law and not English Common Law. *Gallo v. Sting* (6) SA para. 9.

> arrest, or to the jurisdiction of this Court, in a case, where the cause of action, had occurred at sea in a ship, in which both plaintiff and defendant, were passengers, and in which they were both proceeding to England, their proper forum. Consequently, this case, cannot be considered as any precedent, in either of these points.

Hill v. Wallace, 1 Menz. at 348. However, the court's finding was to the effect that, by implication, it had jurisdiction over the matter. *Id.*

In any event, shortly thereafter, in *Mackay v. Philip*, the same court found that the residence of both the plaintiff and the defendant at the Cape was sufficient to render the defendant in a defamation case involving a publication made in England "*amenable to the jurisdiction of the Court.*" Edwards at 49 (quoting *Mackay v. Philip*, (1830) 1 Menz. 455, 460) (emphasis added). More recently, in *Rogaly v. General Imports (Pty) Ltd.*, that court's successor, the Cape Provincial Division, held:

> That an action for damages for the publication of defamatory matter in a foreign country is maintainable in our law is supported by the decision in *Mackay v Philip* (1 M. 455). Burton, J., held, inter alia, that the domicile of the defendant had been clearly proved,

> and said that proof of publication in this colony was unnecessary.

Rogaly v. Gen. Imps. (Pty) Ltd. 1948 (1) SA 1216 (C) at 1223 (S. Afr.) (quoting *Mackay*, 1 Menz. 455 (Burton, J.)). Judge Kekewich, "fully accorded in opinion with his Brother Judges," continued: "It would be monstrous if a person might go over the frontier to the Orange River, for instance, or run down to St. Helena, and at either place publish a libel with impunity." *Rogaly* (1) SA 1216 (C) at 1223 (quoting *Mackay*, 1 Menz. 455 (Kekewich, J.)); *see also* Walter Pollak, *The South African Law of Jurisdiction* 40 (1937).

This is also in accordance with the general principles of South African law of jurisdiction. *See Steytler, NO v. Fitzgerald* 1911 AD 295 (A) at 331 (S. Afr.) (Laurence, J.) ("In civil matters he [i.e., the defendant] is so amenable if he resides there wherever the cause of action arose, on the principle *actor sequitur forum rei.*"). Numerous scholars, based on these authorities, have concluded that the common law of jurisdiction in respect of torts extends to "causes of action" that take place outside the Republic. For example, J.R. Crawford notes:

> There is little Southern African authority as to the principles of law to be applied where action is brought founded upon a delict committed outside the country. *There is, indeed, no dispute that such a delict may be*

> *justiciable* . . . ; but the circumstances in which recovery may be allowed, and the law applicable to such actions, have not been determined.

J.R. Crawford, *The 'Proper' Law of a Delict (A Comment on Boys v. Chaplin)*, 85 S. Afr. L.J. 314, 314 (1968) (emphasis added). Similarly, A.B. Edwards notes: "There can be little doubt that our courts will assume jurisdiction in an action founded on a delict committed abroad." Edwards at 49. The advent of the South African Constitution in 1996 did not change this jurisdictional position. While the Constitution changed the number and geographical demarcation of the High Court's jurisdiction, its basis remains the common law. *See Gallo v. Sting* (6) SA para. 10.

Finally, and while not expressing any expert knowledge in relation to other African jurisdictions, we note that South Africa is not alone in its approach to transitory torts. In respect of Nigeria:

> [The] legal system has long recognised a rule based on the old English case of Phillips v Eyre that a tort committed in a foreign jurisdiction is actionable in a local forum if it is both actionable as a tort according to forum law and not justifiable according to the law of the foreign jurisdiction where the act took place.

Gbenga Bamodu, *In Personam Jurisdiction: An Overlooked Concept in Recent Nigerian Jurisprudence*, 7 J. Private Int'l L. 273, 286 (2011).

II. SOUTH AFRICAN LAW WILL RECOGNIZE VIOLATIONS OF THE NATURE COVERED BY THE ATS AS ACTIONABLE UNDER THE LAW OF DELICT BECAUSE SUCH CONDUCT CONSTITUTES A *CAUSA JURISDICTIONIS*.

The South African law of delict is common law-based; there is very little statutory delictual law. As far as the basis for the action is concerned, the key general principle is wrongfulness. As leading South African delict academics Midgley and Van der Walt note: "The element of wrongfulness constitutes a fundamental and distinct requisite for delictual liability." J.R. Midgley and J.C. Van der Walt, *Delict*, *in* 8 The Law of South Africa 1, 81, para. 59 (W.A. Joubert ed., 2d ed. 2005). In addition, the elements of conduct, fault causation and damage must be met. The basis for the wrongfulness test is the "legal convictions of the community"—a test under South African law, which requires an objective assessment by the court of whether the particular conduct in question is actionable as a delictual wrong. There are two ways that the conduct covered by the ATS—violations of the law of nations—might be considered wrongful, and therefore actionable, as a

delict under South African law: (i) through the *direct* application of the relevant customary international law, and (ii) through the classification of conduct as wrongful.

The first possibility flows from section 232 of the Constitution, which states that: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." S. Afr. Const., 1996.[5] As D.J. Devine has noted (albeit in the context of the previous legal regime), if customary international law is part of the common law, "[i]t follows from this that conduct which infringes customary [international] law must in principle be wrongful in our legal system." D.J. Devine, *International Customary Law as a Possible Source of Actions in Delict*, 106 S. Afr. L.J. 309, 309 (1989). Of course not every breach of customary international law will give rise to a delictual action, as the majority of international rules govern relationships between states and do not directly concern individuals. D.J. Devine suggests "the *ratio legis* of the particular rule of international law" as a means of distinguishing between breaches that are actionable and those that are not. *Id.* at 312–13. In other words:

> If the reason for the existence of a particular rule is primarily to protect the interests of another state, for

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[5] The position was the same under the pre-democratic legal dispensation. *See Nduli & Another v. Minister of Justice & Others* 1978 (1) SA 893 (A) at 906 (S. Afr.).

> example its sovereignty, territorial integrity, political independence, public powers or even public property, then it might be reasonable to infer only a duty towards the state in question operating at the international-law level and no duty to private individuals in the domestic law of delict. The result would be that the interests of individuals would not be protected from invasion by breaches of the rules in question and no remedy in delict would be available to them. On the other hand, if the *ratio legis* was clearly the protection of private interests (as opposed to those of the state), it would not be unreasonable to infer a duty towards those individuals. Breach of such a duty would naturally infringe the rights of such individuals and would thus confer a remedy in delict.

Id. at 313. Accordingly, conduct covered by the ATS—violations of the law of nations—might be considered wrongful, and therefore actionable, as a delict under South African law through the *direct* application of the relevant customary international law.

The second means of qualifying the conduct covered by ATS as actionable as a delict under South African law is to qualify the conduct itself as

wrongful in light of the legal convictions of the community (the central feature of the wrongfulness component of a tort under South African law). While this remains a hypothetical exercise until a court pronounces on the issue, there is good reason to believe that South African courts would find conduct of the nature contemplated by the ATS wrongful.

In this regard, while South African courts have been clear in distinguishing between crimes and delicts, oftentimes courts will find conduct that is criminalized, wrongful as well. That is because criminal conduct can be qualified as both an infringement of a right, and a breach of a legal duty. As Midgely and Van der Walt note:

> The infringement of a subjective right is wrongful. In *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* the court accepted and applied the doctrine of subjective rights, which was facilitated by the existence of general principles of liability in modern South African law. In principle, the wrongful character of an act is constituted by the infringement of a subjective right in the case of wrongful infliction of patrimonial harm as well as in the case of wrongful injury to an aspect of personality. . . .

At present four or five categories of subjective rights are recognised, although new categories might be acknowledged in future. While many of the fundamental rights set out in chapter two of the Constitution are also recognised subjective rights, some are not. Acknowledgement of new subjective rights, however, cannot be deduced from the norms recognised in chapter two, but only from the intrinsic nature of the interests which the chapter protects. Some of the fundamental rights are not susceptible to classification as subjective rights, which means either that an infringement of those rights cannot found an action in delict, or that the doctrine of subjective rights is not the only theoretical basis for delictual liability.

*The wrongfulness of conduct in cases of unjustifiable harm to persons and corporeal things is undoubtedly constituted by the infringement of a right of personality to physical integrity (*corpus*), some real right to the property, or personal immaterial property right.* In the case of defamation a right of personality to the reputation (*fama*) is infringed; in the case of a civil *iniuria* the right of

> personality to dignity or honour (*dignitas*) is impaired; and in the case of an intrusion on or disturbance of privacy the personality right to privacy is infringed.

Midgley and Van der Walt, at para. 62 (second emphasis added) (internal citations omitted). Similarly, wrongfulness can be established as a breach of a legal duty. As Midgley and Van der Walt note:

> A breach of a duty which is recognised in law for the purposes of liability is wrongful. The breach of a legal duty is therefore an independent criterion for determining wrongfulness and plays a vital practical role in founding liability in cases where no infringement of a right is evident. Whether or not there was a legal duty upon the defendant not to harm the plaintiff arises against a background of harm that the defendant's conduct has already caused the plaintiff. If such a duty is found to exist in the particular circumstances, then, with the harm having already been caused in fact, a breach of that legal duty is implicit in such finding. The existence of the legal duty and its breach render the defendant's conduct wrongful.

Id. at para. 63 (internal citations omitted). Furthermore,

> The existence of a legal duty to act or abstain from acting is a conclusion of law reached after consideration of all the circumstances of a case. It depends on a comparative judicial evaluation of the relevant individual and social interests involved in the circumstances of the case. The basic question is whether the plaintiff's interest should be accorded judicial protection against the defendant's conduct in the particular type of situation, and courts now openly acknowledge that public policy plays a role. Legal duties may originate in a Bill of Rights, in a statute or in common law, but to be recognised as a legal duty for delictual purposes, the duty needs to exist in relation to the consequences of the conduct. One may also owe a legal duty to some people but not to others. It must therefore be established that a defendant owes a legal duty not to cause harm to the plaintiff.

Id. (internal citations omitted). Where our criminal law goes our legal convictions generally follow. Our criminal law is the lighthouse in this respect.

In this regard it is notable that South Africa's Parliament has in recent years extended the reach of our criminal law considerably in respect of acts of the nature contemplated by the ATS. First, South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act) provides for extraterritorial jurisdiction to be exercised over war crimes, crimes against humanity and genocide if the offender is present in the Republic after the commission of the crime.[6] ICC Act § 4(3)(c). In this regard, recently, in the matter of *Southern Africa Litigation Centre and Another v. National Director of Public Prosecutions and Three Others*, the High Court confirmed that the ICC Act places a duty on the South African police and the prosecuting authorities to investigate crimes against humanity committed in Zimbabwe where a reasonable basis exists to believe that such offences had occurred. *See* Case No. 77150/09 (N. Gauteng High Ct., May 8, 2012) (S. Afr.) (Fabricius, J.).

Second, certain statutes provide for extraterritorial jurisdiction. First, the Prevention and Combating of Corrupt Activities Act 12 of 2004 (POCA) provides for extraterritorial jurisdiction to be exercised in respect of acts of corruption committed by South African citizens and residents

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[6] While section 4 also provides for the extraterritorial jurisdiction over these crimes on the basis of nationality and passive personality, these categories would in any event be subsumed by section 4(3)(c) which provides for so-called universal jurisdiction. ICC Act § 4(3)(c).

abroad and by registered companies and other associations of persons in South Africa, as well as over individuals arrested in the country. POCA § 35(1). In addition, the Act provides for extraterritorial jurisdiction over acts of corruption that "affect[] or [are] intended to affect a public body, a business[,] or any other person in the Republic" if the offender "is found to be in South Africa" and is not extradited for any reason. POCA § 35(2). Second, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides for extraterritorial jurisdiction to be exercised over sexual offences under the Act under the same terms as POCA. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 §§ 61(1)–(2). Finally, through the Regulation of Foreign Military Assistance Act 15 of 1998 (FMA) certain "mercenary activities" are criminalized and subjected to extraterritorial jurisdiction where the offender is a South African citizen. *See* FMA §§ 8–9.[7]

Third, in addition to these statutory instruments, the common law provides for extra-territorial jurisdiction to be exercised over acts of treason, *see R v. Neumann* 1949 3 SA 1238 (SCC) 1247 (S. Afr.); *R v. Holm, R v Pienaar* 1948 1 SA

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[7] Under the Act it is an offence to "(i) recruit, use or train persons for or finance or engage in mercenary activity," FMA § 2, (ii) "offer to render any foreign military assistance to any state or organ of state, group of persons or other entity or person without authorization" under sections 4 or 5 of the Act. *Id.* at § 3.

925 (A) at 930 (S. Afr.), as well as offences that begin outside the Republic but are completed within its borders. *See R v. Holm*, *R v. Pienaar*, 1 SA at 929 (citing *R v. Coombes*, (1785) 168 Eng. Rep. 296; 1 Leach 388 (Old Bailey [Admiralty] 1785)).

III. THERE ARE BROADER TRENDS TOWARDS EXTRATERRITORIAL JURISDICTION IN AFRICA.

These recent statutory innovations in South Africa must be set against a broader trend towards extraterritorial jurisdiction in Africa. A number of African states have become party to the Rome Statute of the International Criminal Court (thirty-three to date) which obliges each of them to criminalize genocide, crimes against humanity and war crimes in their domestic law and to take appropriate steps to prosecute such offences or, if unwilling or unable to do so, to allow the International Criminal Court to do so in their stead. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9.

In order to give local effect to the principle of complementarity, a small but increasing number of them have adopted legislation to provide for the domestic prosecution of these crimes, as well as to provide for the cooperation obligations of states under the Statute. While African states have been comparatively slow to adopt implementing

legislation, those African states that have done so, have, without exception, provided for extraterritorial jurisdiction to be exercised over crimes against humanity, war crimes, and genocide by their domestic courts in their respective legislation. Most notably, this is done through universal jurisdiction provisions. For example (and in addition to South Africa's ICC Act discussed earlier):

- Section 8(c) of Kenya's International Crimes Act 2008 states that "[a] person who is alleged to have committed an [international crime] . . . may be tried and punished in Kenya for that offence if . . . the person is, after commission of the offence, present in Kenya." International Crimes Act, (2008) Cap. 16 § 8(c).

- Section 18(d) of Uganda's International Criminal Court Act 2010 states that "[f]or the purpose of jurisdiction where an [international crime] . . . was committed outside the territory of Uganda, proceedings may be brought against a person if . . . the person is, after the commission of the offence, in Uganda." The International Criminal Court Act, (2010) *Uganda Gazette* No. 39 § 18(d).

- Section 4(3)(c) of Mauritius' International Criminal Court Act 2011 states that "[w]here a person commits an international crime outside Mauritius, he shall be deemed to have committed the crime in Mauritius if he . . . is present in Mauritius after the commission of the

crime." International Criminal Court Act, (2011) No. 27 § 4(3)(c).

- Senagalese courts may exercise universal jurisdiction over war crimes, crimes against humanity and genocide under Article 669 of the Code of Criminal Procedure. Code Pénal [C. pén.] art. 669.

Finally, it is worth noting that in addition to the Rome Statute implementing legislation, the laws of Botswana, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Swaziland, Tanzania, Uganda, and Zimbabwe all provide for the exercise of universal jurisdiction over "grave breaches" of the Geneva Conventions in terms of their implementing legislation in respect thereof. *See* African Union, AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction 6–7, 17–26 (2009), *available at* http://www.africa-union.org/root/ar/index/Report%20UJ%20_FINAL_English.pdf. Furthermore Burundi, Ethiopia, Republic of Congo, Mali, and Senegal all contain generic provisions within their criminal law providing for universal jurisdiction under certain conditions. *Id.* at 6–7.

CONCLUSION

For the foregoing reasons, amici accordingly respectfully submit that under South African law, as under English law, the equivalent of the US

doctrine of transitory torts is embraced, as a matter of common law. The conduct covered by the ATS—violations of the law of nations—would be considered wrongful, and therefore actionable, as a delict under South African law: (i) through the *direct* application of the relevant customary international law in terms of the South African Constitution, and (ii) through the classification more generally of such criminal conduct as consequently wrongful under our law of delict.

Respectfully submitted,

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APPENDIX A

APPENDIX A
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